

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matters of)		
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Appropriate Framework for Broadband)		
Access to the Internet over Wireline Facilities)	CC Docket No. 02-	Formatted: Tabs: 3.5", Left + 3.88", Left
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Universal Service Obligations of Broadband)		
Providers)		
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Review of Regulatory Requirements for)	CC Docket No. 01-	Deleted: .
337)		Formatted: Tabs: 3.5", Left + 3.88", Left
Incumbent LEC Broadband Telecommunications)		Deleted: .
Services)		
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Computer III Further Remand Proceedings; Bell)		
Operating Company Provision of Enhanced)	CC Docket Nos. 95-	Formatted: Indent: Left: 0", Hanging: 3.5", Tabs: 3.88", Left
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Services; 1998 Biennial Regulatory Review --)		Deleted: -20,
Review of Computer III and ONA Safeguards and)		
Requirements)		
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Conditional Petition of the Verizon Telephone)		
Companies for Forbearance Under 47 U.S.C.)	WC Docket No. 04-	Formatted: Tabs: 3.5", Left + 3.88", Left
242)		
§160(c) with Regard to Broadband Services)		
Provided Via Fiber to the Premises; Petition of the)		
Verizon Telephone Companies for Declaratory)		
Ruling or, Alternatively, for Interim Waiver with)		
Regard to Broadband Services Provided Via Fiber)		
to the Premises)		
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Consumer Protection in the Broadband Era)	WC Docket No. 05-	Formatted: Indent: Left: 0", Hanging: 3.5", Tabs: 3.88", Left
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OPPOSITION OF UPLC

I. Introduction

Pursuant to 47 C.F.R. Section 1.429(f) of the Commission's Rules, the United Power Line Council ("UPLC") files this opposition to the Petition of the Arizona Corporation Commission for Clarification and/or Reconsideration in the above-referenced proceedings.¹ The UPLC opposes the petition because it raises issues that are outside of the scope of the proceeding and/or it is contrary to law and Commission precedent. The classification of VoIP services is a separate issue from the classification of wireline broadband Internet access services; and if it is addressed by the FCC at all, it should be done so through a different proceeding. Moreover, wireline broadband Internet access services combines transmission with other applications inextricably, and cannot be separated into components (i.e. unbundled transmission) that would possibly be subject to conflicting regulatory classifications/jurisdiction.

The UPLC is an alliance of utilities and their technology and service provider partners to develop broadband over power line (BPL) solutions in North America. Its members include virtually every utility and technology company that is actively engaged in the development of BPL in the country. Many of these members have deployed BPL

¹ Petition of the Arizona Corporation Commission for Clarification and/or Reconsideration in CC Docket No. 02-33, *et al* (filed Nov. 16, 2005). *See also* *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, 2005 WL 2347773 ("DSL Order").

systems in various trials to determine its technical and economic viability. Some have deployed BPL on a commercial basis, but are only beginning to offer it widely.² These trials and commercial deployments have yielded encouraging results, and the UPLC is optimistic about the future of BPL. BPL is viewed as a competitor to cable modem and DSL services, because it offers similar capabilities and supports similar applications. As such, it is likely that the rules adopted for cable modem and wireline broadband Internet access services would be applied in the future to BPL, although the Commission expressly deferred from doing so in this proceeding.³ Therefore, the UPLC and its members could be indirectly affected by the petition filed by the Arizona Corporation Commission, and they are compelled to oppose the petition for that reason.

The Arizona Corporation Commission asks the Commission to classify the combined offering of VoIP and DSL as a telecommunications service, and recognizes that this is an issue that is

²Dionne Searcy and Rebecca Smith, "High-Speed Internet over Power Lines Could Serve Millions," Wall Street Journal, p. B1, Dec. 19, 2005.

³ *DSL Order* at ¶¶ 11, n. 30 (deferring from addressing the regulatory classification of BPL). *See also Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, 17 FCC Rcd. 3019 at n. 1 (2002) (this proceeding does not address classification issues of broadband Internet access services provided over traditional or new cable, wireless, (satellite, mobile, or fixed wireless), power line (electric grid), or all-fiber networks that do not have any roots in traditional telephone networks). *And see DSL Order* at ¶45 (stating that the Commission intends to regulate like services in a similar manner.)

not directly addressed by the *DSL Order*.⁴ The UPLC believes that the Commission intentionally avoided this issue because it was beyond the scope of the proceeding.⁵ In any event, the UPLC respectfully requests that the Commission refrain from addressing this issue, pending the resolution of litigation and the IP-Enabled Services proceeding.⁶

The Arizona Corporation Commission also urges the Commission to classify the unbundled transmission component of wireline broadband services as a telecommunications service.⁷

⁴ Petition of the Arizona Corporation Commission for Clarification and/or Reconsideration in CC Docket No. 02-33, *et al* at 5 (filed Nov. 16, 2005).

⁵ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, 17 FCC Rcd. 3019 at ¶25 (2002)(explaining that wireline broadband only uses telecommunications and that the transmission component should not be considered a telecommunications service.) The NPRM indicates that the FCC was not even considering the regulatory classification of VoIP when offered in conjunction with wireline broadband Internet access services. It only addressed the issue of telecommunications to the extent that wireline broadband uses it to reach the Internet.

⁶ See, e.g., *California v. FCC*, No. 05-70007 (9th Cir. filed Jan. 3, 2005); *New York v. FCC*, No. 05-1060 (2d Cir. filed Jan. 7, 2005); *Pub. Util. Comm'n of Ohio v. FCC*, No. 05-3056 (6th Cir. filed Jan. 7, 2005); *Minnesota Pub. Util. Comm'n v. FCC*, No. 05-1069 (8th Cir. filed Jan. 6, 2005); *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-1122 (8th Cir. filed Jan. 11, 2005). Each of these cases was consolidated in the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) in *California v. FCC*. See *California v. FCC* (No. 05-70007). On April 15, 2005, however, the Ninth Circuit granted a motion by the state of California and the California Public Utility Commission for voluntary dismissal, and currently is considering a motion to transfer the remaining cases to the United States Court of Appeals for the Eighth Circuit. See Petitioners Joint Motion to Transfer Proceedings and Amend Briefing Schedule, *National Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-71238 (9th Cir. filed Feb. 22, 2005). See also, *IP Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004).

⁷ Petition of the Arizona Corporation Commission for Clarification and/or Reconsideration in CC Docket No. 02-33, *et al* at 6-9 (filed Nov. 16, 2005).

Specifically, it claims that the transmission component of DSL is no different from stand-alone ATM services, frame relay or gigabit Ethernet services that carriers offer and end-users use on a common carrier basis. It also notes that DSL providers hold out their services indifferently to the public at large, and that the Commission actually does allow DSL providers to choose to offer services on a common carrier or non-common carrier basis.⁸

The petition misses the point. Even though DSL uses some of the same underlying facilities that provide common carrier services, the FCC distinguished ATM, gigabit Ethernet and other traditional telecom facilities from DSL precisely because DSL combines the transmission and information service components inextricably.⁹ Similarly, the fact that the Commission allowed wireline broadband providers to offer service on a common carrier or a non-common carrier basis also is unavailing. The Commission didn't pretend to have "unfettered discretion over the carrier status of a given entity:" it merely recognized that carriers may voluntarily opt for common carrier regulation.¹⁰ The FCC also explained why it was departing from its prior policy of requiring ILECs to provide unbundled access to

⁸ *Id.*

⁹ *DSL Order* at ¶10.

¹⁰ *See* Petition of the Arizona Corporations Commission for Clarification and/or Reconsideration in CC Docket No. 02-33 at 7 (filed Nov. 16, 2005).

competitors, and how it will phase out those requirements over a one-year period.¹¹ Therefore, the basis for the FCC's decision to classify the transmission component of DSL as an information service is reasonable and would be entitled to deference.¹²

¹¹ *DSL Order* at ¶41. *See also Id.* at ¶106, quoting *National Cable & Telecomm's. Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, slip op at 18 (2005) ("[t]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.").

¹² *DSL Order* at ¶¶105-106 (concluding that wireline broadband Internet access service does not include the provision of a telecommunication service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers and explaining that this decision is supported by changed circumstances and market conditions).

II. CONCLUSION

Wherefore, the UPLC believes that the Commission need not and should not reach the issue of the regulatory classification of a combined VoIP/DSL service offering, which is implicated in pending litigation and a separate FCC proceeding. It also supports the classification of wireline broadband Internet access services as information services, and opposes classifying the unbundled transmission component as a telecommunications service. Therefore, the UPLC respectfully submits that the Commission should expeditiously affirm the *DSL Order* in these respects.

Respectfully submitted,

United Power Line Council

By:

Brett Kilbourne
Director of Regulatory Services and
Associate Counsel

1901 Pennsylvania Avenue, N.W.
Fifth Floor
Washington, D.C. 20006
(202) 872-0030

December 19, 2005

SERVICE LIST

Christopher C. Kempley
Marueen A. Scott
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

